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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. [redacted] 86

TOPPS CHEWING GUM, INC.,
Petitioner

vs.

HAELAN LABORATORIES, INC.,
Respondent

PETITIONER'S REPLY BRIEF

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Counsel for Petitioner

RESPONDENT'S Points I, III, IV, V and VI present nothing that has not been covered in the petition and supporting brief. A short reply to respondent's Point II, however, is in order.

Respondent writes on page 6 of its brief:

> "It is well settled that where one accepts the benefits of a judgment he waives his right to appeal therefrom; certainly he waives the right to appeal from that portion of which he has taken the benefit."

This is undoubtedly the general rule, subject however to exceptions, one of which is implicit in the second clause of the quoted statement: where the judgment consists of separable parts, acceptance of benefits under one part is no bar to an appeal from the other, *Embry* v. *Palmer*, 107 U. S. 3, 8; *Gilfillan* v. *McKee*, 159 U. S. 303, 311.

As in *Gilfillan* v. *McKee*, there were practically two judgments in this case. Respondent in its amended complaint charged petitioner with using, in connection with the sale of its candy, the names and pictures of certain baseball players to which respondent claimed exclusive rights (Paragraph 19, R. 17), and with entering into contracts with such players, thereby impairing the value of respondent's rights under its contracts (Paragraph 20, R. 18). Petitioner, after denying these charges in its amended answer (Paragraphs 9 and 10, R. 32, 33), counterclaimed, charging respondent with having induced certain players to breach their contracts with petitioner's licensors (Paragraph 35, R. 38). Both amended complaint and counterclaim were dismissed by the District Court (R. 731). The Court of Appeals reversed and remanded the case to the trial court for a determination of the following facts:

> "* * * (1) the date and contents of each of plaintiff's contracts, and whether plaintiff exercised its option to renew; (2) defendant's or Players' conduct with respect to each such contract." (R. 762)

> "* * * (3) The date and contents of each of defendant's contracts under which defendant claims, and whether defendant exercised its option to renew, and (4) plaintiff's conduct with respect to each such contract." (R. 772)

The first and second of these facts were in support of the complaint; the third and fourth in support of the counterclaim. Thus, there were in effect two separate judgments; one in favor of the respondent on the complaint; the other in favor of petitioner on the counterclaim.

On the remand both parties moved for temporary injunctions as the Court of Appeals had suggested (R. 774). As a result of the proceedings before the District Court on the remand an interlocutory order was entered on June 5, 1953 enjoining petitioner from "selling and delivering directly or indirectly any chewing gum, chewing gum product and/or confection along with any cards bearing the name, likeness, signature and/or biographical description of" 387 named baseball players. Respondent was similarly enjoined with respect to 26 named baseball players. Both parties have appealed from this interlocutory order to the Court of Appeals for the Second Circuit.

Petitioner had moved seasonably in the Court of Appeals for a stay of that Court's mandate to permit the filing of this petition before supplementary proceedings in the District Court. Had that motion been granted and the stay ordered this question of waiver would not have arisen; but unfortunately the motion was denied (R. 773), and the case hastily remanded with instructions (R. 774). Petitioner had, therefore, either to stand mute, sustained and soothed by an unfaltering trust in the rectitude of its legal position, or accept the invitation of the Court of Appeals to join with respondent in cross motions for temporary injunctions. To have rejected that invitation and so have renounced the temporary defensive advantage of a cross

motion would have been an act of quixotic folly without justification in law or common sense.

Whether or not petitioner may seek a review of the judgment of the Court of Appeals in its favor, it may certainly seek a review of that separable part of the judgment in *respondent's* favor. If this should appear to involve petitioner in an inconsistency, what of it? Rule 8 (e) (2) of the Federal Rules of Civil Procedure permits inconsistent defenses. *Automobile Ins. Co.* v. *Barnes-Manley Wet Wash Laundry Co.*, 168 F. 2d 381, 386 (10 Cir.). But there is no inconsistency with respect to the judgment in respondent's favor, and if a reversal of that judgment might adversely affect the separable judgment in petitioner's favor, that is a matter concerning which respondent may not complain.

FINALLY, IT IS APPROPRIATE TO NOTE THAT THIS IS NOT AN APPEAL. PETITIONER IS NOT ASSERTING A RIGHT BUT SEEKING A PRIVILEGE. MOREOVER, A PUBLIC INTEREST IS INVOLVED, EQUAL, IF NOT PARAMOUNT TO THE RIGHTS OF THE PARTIES.

Respectfully,

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New York, N. Y.,
July 14, 1953.